IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

Criminal Action No. 00-CR-510-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONRADO VALENZUELA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Babcock, C. J.

Mr. Valenzuela is charged with one count of possession with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 841(a)(1). Mr. Valenzuela moves to suppress statements and evidence. A hearing on the motions was held May 8, 2001 and May 9, 2001. Based on the motions as now supplemented, responses, counsels' arguments, and evidence presented, I deny both motions.

I. Findings of Fact

On September 20, 2000 Colorado State Patrol Trooper Reaborn Cox stopped Mr. Valenzuela on northbound I-25 south of Pueblo, Colorado after observing him weave across lane lines three times. Mr. Valenzuela was driving a Ford Expedition, and his seventeen year-old son Cesar Valenzuela was in the passenger seat. The Ford had Arizona license plates and Mr. Valenzuela produced an Arizona driver's license. He told Trooper Cox that he was traveling to Denver from Tucson because his sister was in the hospital. Mr. Valenzuela said he did not know

which hospital his sister was in, but he had relatives in Denver who would know. This story was a fabrication. Trooper Cox asked if he was tired, and Mr. Valenzuela said that he had been driving a long time. Trooper Cox suggested that Mr. Valenzuela take a break in Pueblo before continuing on to Denver. Both Trooper Cox and Mr. Valenzuela spoke in English and were able to understand each other.

Trooper Cox returned to his vehicle to run a check on Mr. Valenzuela's vehicle and driver's license. He noticed that Mr. Valenzuela acted stiff and uncomfortable, and had not made eye contact even when speaking. Tucson, like cities in most border states, is a source for illegal drugs. Denver, like most cities, is a destination for illegal drugs. The Trooper also found the story about the sister suspicious. The vehicle registration showed a salvage title. Trooper Cox had been trained that drug smugglers often take wrecked vehicles and rebuild them with secret compartments. Mr. Valenzuela's race was but one factor in Trooper Cox's thinking at the time. Mr. Valenzuela's license and registration were cleared, however.

Trooper Cox walked back to the Ford and returned Mr. Valenzuela's documents. He did not ticket Mr. Valenzuela. He told Mr. Valenzuela that he was free to leave. Mr. Valenzuela started his car's engine. Trooper Cox then asked Mr. Valenzuela if he could ask a few questions. Mr. Valenzuela said "yes." Trooper Cox asked if Mr. Valenzuela had any weapons in the vehicle. Mr. Valenzuela responded "no." Trooper Cox asked if he had any illegal drugs in the vehicle. Mr. Valenzuela responded "no." Trooper Cox asked if he could search the vehicle. Mr. Valenzuela responded "yes." At Trooper Cox's request, Mr. Valenzuela and his son exited the vehicle and stood on a frontage road approximately thirty feet away from the Ford. Trooper Cox did not ask Mr. Valenzuela to sign a "consent to search" form.

In the vehicle, Trooper Cox found a cell phone and pager. He noticed that the trim that covers the rocker panel and carpet in the back of the car was not anchored down. The carpet was also not anchored down. Trooper Cox lifted the carpet and saw several duct-taped packages in a non-factory built compartment. He cut a slit in the tape of one package and saw a yellowish cake-like substance. He scraped at the yellow with a pocket knife, and saw a white substance underneath which he believed to be an illegal drug. The substance later tested positive for cocaine.

Trooper Cox informed Mr. Valenzuela and his son that he found illegal drugs, placed both under arrest, and handcuffed both. He then read each his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966) in English. He did not provide Mr. Valenzuela with a written advisement. Both Mr. Valenzuela and his son indicated that they understood their rights. After other officers arrived, Trooper Cox drove Mr. Valenzuela in his patrol car alone to the Colorado State Patrol office in Pueblo. While in the car he told Mr. Valenzuela that Mr. Valenzuela could help himself by cooperating in a controlled delivery of the drugs. Mr. Valenzuela did not answer.

Mr. Valenzuela arrived at the station approximately thirty minutes after the initial stop. At the station, Mr. Valenzuela was turned over to Colorado CBI Agent Luis Torres and Pueblo Police Detective Mark Thalhamer of the Southern Colorado Drug Task Force. While in a room with the two officers Mr. Valenzuela indicated that he wished to speak to Trooper Cox. He told Trooper Cox that he would cooperate in a controlled delivery if officers would not charge his son with possession of the drugs. He told Trooper Cox that his son did not know anything about the cocaine and was only along to assist in driving the car. Trooper Cox agreed. Mr. Valenzuela was again read his rights pursuant to *Miranda* in both English and Spanish by Agent Torres, and he

initialed and signed a Colorado State Patrol advisement of rights form. This advisement took place approximately ten to fifteen minutes after Mr. Valenzuela met the agents, and within fifty minutes of arriving at the station.

Mr. Valenzuela then explained the drug transportation system to Agent Torres and Detective Thalhamer. He told them that the drugs were a partial shipment of cocaine traveling from Arizona to Chicago, Illinois. Each weekly shipment contained 75 kilos of cocaine. The car was loaded with cocaine in Tucson, then driven to Chicago. In Chicago, Mr. Valenzuela would receive a phone call telling him where to leave the car. The car was sometimes re-loaded with money for the return trip to Arizona. Mr. Valenzuela was a former equipment driver at a warehouse. The job transporting drugs was offered to him by his brother-in-law. He was paid $20,000.00 per trip. Mr. Valenzuela communicated this information to the officers in English.

DEA agents attempted a controlled delivery in the Chicago area with the help of Mr. Valenzuela. They kept Mr. Valenzuela and his son in custody throughout the trip to Chicago. Although they spent several days in Chicago, they were unable to make a successful delivery of the cocaine. Cesar Valenzuela was told in Chicago that he would be released, but would have to find his own way back to Arizona. Because he had no money, he opted instead to accompany the agents back to Colorado, where he was released to return home.

Mr. Valenzuela is a forty year-old man with approximately seven years of education. He has only been educated in Mexico, and has received no schooling or training in the United States. He has, however, worked in the United States at one job for nineteen years and was able to communicate with officers in English. He appeared intelligent in his testimony.

II. Conclusions of Law

Mr. Valenzuela moves to suppress all evidence found in the Ford, arguing that his stop and detention violated his Fourth Amendment rights, his consent to search the vehicle was invalid, and the Trooper lacked jurisdiction to search the car. I consider each argument in turn.

A. Validity of the Stop

An ordinary traffic stop is a limited seizure and is more like an investigative *Terry* stop than a custodial arrest. *See United States v. Walker*, 933 F.2d 812, 815 (10th Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992). The reasonableness of traffic stops are assessed, therefore, under the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). To determine the reasonableness of an investigative detention, "a dual inquiry [is undertaken], asking first 'whether the officer's action was justified at its inception,' and second 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998) (quoting *Terry*, 392 U.S. at 20).

An initial traffic stop is valid under the Fourth Amendment not only if based on an observed traffic violation, but also if the officer has a reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring. *See United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995), *cert. denied*, 518 U.S. 1007 (1996). If "the officer's action was justified at its inception," *Hunnicutt*, 135 F.3d at 1348 (quoting *Terry*, 392 U.S. at 20), the permissible scope of an investigatory detention depends on "the particular facts and circumstances of each case." *Florida v. Royer*, 460 U.S. 491, 500 (1983). The detention must in any case "last no longer than is necessary to effectuate the purpose of the stop" and "be carefully tailored to its underlying justification." *Id*. Thus, "[a]n officer conducting a routine traffic stop may run computer checks on the driver's license, the vehicle registration papers, and on whether

the driver has any outstanding warrants or the vehicle has been reported stolen." *United States v. Mendez*, 118 F.3d 1426, 1429 (10th Cir. 1997) (citations omitted). "However, once the computer checks confirm that the driver has produced a valid license and proof of entitlement to operate the car, the driver must be permitted to proceed on his way, without further delay by police for additional questioning." *Id*.

The Tenth Circuit recently interpreted this to mean that "an officer conducting a routine traffic stop may not ask the detainee questions unrelated to the purpose of the stop, even if the questioning does not extend the normal length of the stop, unless the officer has reasonable suspicion of illegal activity." *United States v. Holt*, 229 F.3d 931, 936 (10th Cir. 2000). In *Holt*, law enforcement officers established a roadblock because they anticipated catching the defendant transporting drugs in his truck. The law enforcement officers conducted a legitimate traffic stop of the defendant for failure to wear a seatbelt. While in possession of the defendant's driver's license, a police officer asked the defendant whether

> 'there was anything in [the defendant's] vehicle [the police officer] should know about such as loaded weapons'. . . . [The Defendant] stated there was a loaded pistol behind the passenger seat of his vehicle. [The police officer then] asked Holt if 'there was anything else that [the police officer] should know about in the vehicle.' [The defendant] stated, 'I know what you are referring to' but 'I don't use them anymore'. . . . Upon further questioning by [the police officer, the defendant] indicated that he had previously used drugs, but 'hadn't been involved with them in about a year or so'. . . . [The police officer] then asked [the defendant] for consent to search his vehicle. [The defendant] agreed.

Id. at 933.

In determining that this line of questioning rendered the detention unconstitutional, the Tenth Circuit acknowledged three other Tenth Circuit opinions in which detentions were not deemed unconstitutional even though the police officers involved queried the defendants

regarding their travel plans. *See id.* at 937 (citing *United States v. Kopp*, 45 F.3d 1450, 1454 (10th Cir. 1995); *United States v. McSwain*, 29 F.3d 558, 561 (10th Cir. 1994); *United States v. Rivera*, 867 F.2d 1261, 1263 (10th Cir. 1989)). The *Holt* court then stated that:

> in none of these cases did the defendants directly challenge the questions about travel plans. Thus, none of the decisions explore or explain why it is constitutionally permissible for an officer to ask a detainee about his or her travel plans if the questioning is unrelated to the purpose of the stop.

Id. The Court did not directly address whether travel plan questions are permissible, however, it concluded that "the cases from this circuit . . . clearly indicate that questions about weapons or contraband must be precipitated by reasonable suspicion." *Id*. (citing four Tenth Circuit decisions).

Here, Trooper Cox testified that he saw Mr. Valenzuela weave out of his lane at least three times. Mr. Valenzuela denies weaving, but admits that it was a very windy day, that he was tired after driving all night with no respite, and that he was going to change lanes prior to seeing the Colorado State Patrol car behind him. I find Trooper Cox's testimony on this point more credible, and conclude that Trooper Cox observed Mr. Valenzuela commit a traffic violation. The stop of Mr. Valenzuela's car was therefore permissible.

Although Trooper Cox queried Mr. Valenzuela briefly about his travel plans during the traffic stop, under the circumstances here the questions were permissible as reasonably related to the purpose of the stop for weaving. I conclude based on Tenth Circuit precedent that these questions did not violate the Fourth Amendment. *See United States v. Kopp*, 45 F.3d 1450, 1454 (10th Cir. 1995); *United States v. McSwain*, 29 F.3d 558, 561 (10th Cir. 1994); *United States v. Rivera*, 867 F.2d 1261, 1263 (10th Cir. 1989). The stop of Mr. Valenzuela's car was proper

under the Fourth Amendment.

B. Validity of the Detention Following the Stop

The Tenth Circuit has defined the parameters of permissible activity during a routine traffic stop:

> 'An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.'

United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir.), *cert. denied*, 517 U.S. 1114 (1994) (quoting *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988)). Detention beyond the period permitted for a routine traffic stop is only justified if the officer "has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring . . . [or] the initial detention has become a consensual encounter." *Id*. at 1483 (citations omitted).

The government does not argue that Trooper Cox had an objectively reasonable and articulable suspicion of drug trafficking sufficient to support the continued detention of Mr. Valenzuela. The issue, therefore, is whether the initial stop evolved into a consensual encounter.

"In determining whether a driver and police officer are engaged in a consensual encounter in the context of a traffic stop, there are few, if any, bright-line rules." *United States v. Elliott*, 107 F.3d 810, 814 (10th Cir. 1997) (citation omitted). "[A]n encounter initiated by a traffic stop may not be deemed consensual unless the driver's documents have been returned to him." *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir.) (citation omitted), *cert. denied*, 511 U.S. 1095 (1994). Nevertheless, return of the driver's documents is a necessary, but not a sufficient, condition for a finding of a consensual encounter. If the driver's documents have been

returned, whether the detention was consensual is determined under the "totality of the circumstances." *Elliott*, 107 F.3d at 814.

The inquiry then is whether "a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *United States v. McKneely*, 6 F.3d 1447, 1451 (10th Cir. 1993) (citations omitted). Although not required, whether the officer informed the defendant that he was free to leave the scene or that he could refuse to give consent is one factor to consider in conducting the "totality of the circumstances" test. *See United States v. Gregory*, 79 F.3d 973, 979 (10th Cir. 1996).

Here, Trooper Cox informed Mr. Valenzuela of the reason for the stop, ran his driver's license and registration through the computer, and returned Mr. Valenzuela's documents to him. Trooper Cox informed Mr. Valenzuela that he was free to leave. Mr. Valenzuela started his car and was preparing to leave when Trooper Cox asked whether he could ask further questions. Mr. Valenzuela gave consent, leading to further questions and the search.

Mr. Valenzuela argues, however, that he was the target of police racial profiling and, thus, Trooper Cox's actions violated the Fourth Amendment. Whether racial profiling/targeting violates the Fourth or Fourteenth Amendments is not entirely clear. However, in *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court stated "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 813 (1996). The Sixth Circuit has stated that when "an officer initially targets someone solely because of his race, without additional factors. . . . [s]uch actions [are] constitutionally impermissible, violative of the Equal Protection Clause." *United States v. Avery*, 137 F.3d 343, 353-54 (6th Cir. 1997) (emphasis

added). No other federal courts that have addressed this issue. *But see United States v. Scopo*, 19 F.3d 777, 786 (2d Cir. 1994) (Newman, J., concurring) (speculating that while pretextual traffic stops based on probable cause are not Fourth Amendment violations, their selective use based on race could violate the Equal Protection clause).

Whether the exclusionary rule applies to Fourteenth Amendment violations is similarly unclear. The Supreme Court has stated in extending the exclusionary rule for Fourth Amendment violations to cases pursued in state court through the Due Process Clause of the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643, 657 (1961), that "[t]he philosophy of [the Fourth and Fourteenth Amendments] and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence–the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." *See id.* ("our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense."). Similarly, in applying the exclusionary rule through the Due Process Clause of the Fourteenth Amendment to evidence seized by state law enforcement authorities in violation of the Fourth Amendment and used in federal prosecutions, the Supreme Court stated, "surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case." *Elkins v. United States*, 364 U.S. 206, 215 (1960).

This language led the Sixth Circuit to state, albeit in the dictum of an unpublished opinion, that "evidence seized in violation of the Equal Protection Clause should be suppressed." *United States v. Jennings*, 1993 WL 5927 *4 (6th Cir. Jan. 13, 1993) (holding that "[t]he

defendant fails to show by a preponderance of the evidence that race constituted a motivating factor in the stop and questioning."). Nevertheless, the Sixth Circuit in holding that "consensual searches may violate the Equal Protection Clause when they are initiated solely based on racial considerations," *United States v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995) (emphasis added), refused to answer the question whether the exclusionary rule applies to Fourteenth Amendment violations because no such violation occurred. *See Travis*, 62 F.3d at 174. In a later decision, the Sixth Circuit decided that the use of race as the sole factor in deciding to stop an individual in an airport violates the Fourteenth Amendment. *See United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997) ("we find that citizens are entitled to equal protection of the laws at all times."). Although the *Avery* court never explicitly addressed the issue, it must have implicitly assumed that a violation of the Fourteenth Amendment would be subject to the exclusionary rule. The question raised in that case was whether the District Court erred in denying the appellant's motion to suppress. If the *Avery* Circuit believed that the exclusionary rule did not apply to Fourteenth Amendment violations, it could have stated as much and denied the appeal without addressing whether the law enforcement officials there violated the Fourteenth Amendment. Under the circumstances of *Avery*, had there been a Fourteenth Amendment violation, the only possible remedy would have been suppression.

Under the facts of this case the Fourteenth Amendment issue is not squarely before me because I find from the evidence that racial considerations were not the sole basis for Trooper Cox's actions. Mr. Valenzuela subpoenaed and received fifty affidavits written by Officer Cox in support of warrantless arrests. Although many of the affidavits do not disclose the race or ethnicity of the suspect, some of the suspects produced Mexican identification cards and the

majority have Hispanic surnames. *See* Defendant's Exhibit A. Officer Cox testified that in deciding whether he has reasonable suspicion that a car may be carrying drugs, the race or ethnicity of the driver may be one factor in his thinking. He testified that he sometimes considers the race of a suspect because the Drug Enforcement Administration has informed officers that the majority of drug smugglers in his part of the state are Hispanic. He also testified that it didn't became clear to him until he was at the window of Mr. Valenzuela's car that Mr. Valenzuela was Hispanic. Trooper Cox stopped the vehicle for a traffic violation. The Arizona license plate, Tucson address on the driver's license, Mr. Valenzuela's demeanor, and the salvage title all factored into his thinking.

Although the affidavits provided by the Colorado State Patrol indicate a large number of Hispanic arrestees, it is impossible for me to extrapolate from this information that Trooper Cox profiles Hispanics solely on the basis of race. These affidavits exist only because Trooper Cox found narcotics of some kind during a search and, thus, made a warrantless arrest. The affidavits don't reflect any stops made by Trooper Cox in which no search was conducted or no drugs were found. Further, there is no persuasive evidence that the Trooper targeted any of these suspects solely because of their race, or that the stops were made for pretextual reasons. Finally, there is no persuasive evidence that the stop of Mr. Valenzuela's car was made for pretextual reasons. *See* Part IIA, *supra*. Even assuming the Fourteenth Amendment is a font for application of the exclusionary rule, I conclude that no impermissible racial profiling or targeting occurred in this case, and that the stop made by Trooper Cox became a consensual encounter once Mr. Valenzuela's documents were returned and he consented to further questions.

Defense counsel makes much of the fact that Trooper Cox studies the law of the United

States Supreme Court and the Tenth Circuit to systematically structure his conduct during traffic stops. I am invited, therefore, to conclude that his actions are pretextual and his testimony incredible. But it is the goal of the courts to define the constitutional parameters of an officer's conduct so that the officer acts lawfully. Knowledge of the rules is to be encouraged, not discouraged. Counsel's invitation and speculative conclusions are antithetical to this goal.

I therefore conclude that the traffic stop of Mr. Valenzuela evolved into a consensual encounter, and no constitutional violation took place.

C. Validity of the Consent to Search the Car

A valid search may be made of a vehicle without a warrant or probable cause when a person in control of the vehicle has given voluntary consent to search. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Santurio*, 29 F.3d 550, 552 (10th Cir. 1994). Whether such consent has been given is a question of fact and is determined from the totality of the circumstances. *See United States v. Mendenhall*, 446 U.S. 544 (1980); *Santurio*, 29 F.3d at 552. "The government bears the burden of proving the voluntariness of consent" by a preponderance of the evidence. *United States v. Fernandez*, 18 F.3d 874, 881 (10th Cir. 1994). I apply a two-step test for determining the voluntariness of a consent:

> First, the government must proffer clear and positive testimony that consent was unequivocal and specific and freely and intelligently given. Furthermore, the government must prove that this consent was given without implied or express duress or coercion.

United States v. McRae, 81 F.3d 1528, 1537 (10th Cir. 1996) (quoting *United States v. Angulo-Fernandez*, 53 F.3d 1177, 1180 (10th Cir. 1995)). *See United States v. Price*, 925 F.2d 1268, 1270 (10th Cir. 1991) (en banc) ("The presumption against voluntary waiver of constitutional rights does not apply in consent search cases.") (citing *Schneckloth v. Bustamonte*,

412 U.S. 218, 235-37 (1973), which distinguished Fourth Amendment concern with consent searches from other fundamental rights under the Fifth and Sixth Amendments). In conducting this inquiry, I consider the following nonexclusive list of factors: physical mistreatment, use of violence or threats of violence, promises or inducements, deception or trickery, and the physical and mental condition and capacity of the defendant. *See United States v. Glover*, 104 F.3d 1570, 1583 (10th Cir. 1997).

Because I have concluded that no illegality exists in the stop or questioning of Mr. Valenzuela, I must only decide if Mr. Valenzuela gave voluntary consent for the search of his car. Trooper Cox testified that he asked for, and was given, clear and unequivocal consent to search the car. Cesar Valenzuela testified that he heard the Trooper ask Mr. Valenzuela if he had any guns or drugs in the car, but because of passing traffic did not hear the Trooper ask for consent to search. He credibly testified that the Trooper might have said something about consent to his father, but he didn't hear it. He did not see the Trooper do anything with his gun, and he stated that Trooper Cox was never discourteous.

Mr. Valenzuela testified, however, that he was never asked for consent to search the car. I find that his testimony is not credible. Mr. Valenzuela admits that he lied to the Trooper regarding his destination and the presence of drugs in the car. Further, his testimony during the hearing was frequently contradictory. He first testified that he did not give consent, but stepped out of the car because a police officer made the request. He later testified that he stepped out of the car because Trooper Cox had his hand on his gun. Mr. Valenzuela repeatedly demonstrated how Trooper Cox held his hands, and repeatedly stated that the Trooper's right hand was on the gun. However, Trooper Cox wears his gun on the left. When confronted with this discrepancy,

Mr. Valenzuela became flustered and tried to explain that the Trooper was holding both hands strangely, and perhaps had another gun behind his back. Mr. Valenzuela later testified that although he knew that his car was loaded with cocaine, he had no idea how much, had no idea that it was in a concealed compartment, and was not at all nervous when he was stopped by the State Patrol. He admits that he never protested the search or asked the Trooper to stop searching.

Given the inconsistencies in Mr. Valenzuela's testimony, I find that Trooper Cox's testimony is more credible on this point. I therefore conclude that Mr. Valenzuela gave specific and unequivocal consent to search the car and the consent was freely and intelligently given.

D. Scope of Consent to Search the Car

The standard for measuring the scope of an individual's consent to search is that of "objective reasonableness," asking what the typical reasonable person would have understood to be the scope of his or her consent under the circumstances. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *United States v. Pena*, 143 F.3d 1363, 1367-68 (10th Cir. 1998). The scope of a consent to search "is generally defined by its expressed object, and is limited by the breadth of the consent given." *United States v. Elliott*, 107 F.3d 810, 814-15 (10th Cir. 1997) (citations and internal quotation marks omitted). The general rule is that "'where a suspect does not limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle,'" including the trunk, *United States v. West*, 219 F.3d 1171, 1177 (10th Cir. 2000) (quotations omitted), and panels that are not readily accessible. *See United States v. Pena*, 920 F.2d 1509, 1514 (10th Cir. 1990) (finding that consent to "look in" a car allowed the officer to remove the rear quarter panel vent). A general consent to search also includes closed containers within a vehicle. *See Jimeno*, 500

U.S. 248.

Although Mr. Valenzuela argues that he gave no consent at all, he does not argue that the scope of any consent was exceeded. He admits that he never asked the Trooper to stop searching or gave any other signal that the Trooper had exceeded Mr. Valenzuela's wishes. I therefore conclude that Mr. Valenzuela granted Trooper Cox a general consent to search, and that the search of the hidden compartments was within the scope of that consent.

E. Jurisdiction

Mr. Valenzuela argues the Colorado State Patrol lacks jurisdiction to investigate illegal drug activity. There is no merit to this argument.

The Colorado State Patrol is created by statute. *See* Colo. Rev. Stat. § 24-33.5-201 *et seq.* Officers are specifically empowered to perform certain tasks. First, an officer may "[r]equire the operator of any vehicle to stop and, upon demand, exhibit his driver's license and registration card . . .and submit to a complete inspection of such vehicle and the equipment, interior, cargo, license plates . . . when there is reasonable cause to believe that the vehicle is being operated in violation of any law of this state regulating the operation of vehicles or use of the highways or any other law mentioned in this part 2. . . ." *Id.* at § 24-33.5-212(1)(b). Weaving is a violation of Colorado motor vehicle law. *See* id. at § 42-4-1701(1). Second, officers of the Colorado state patrol "have all the powers of any peace officer to . . . Make arrest upon view and with or without warrant for any violation of the provisions of . . . any criminal law of this state if, during an officer's exercise of powers or performance of duties under this section, probable cause is established that a violation of said criminal law has occurred . . . ." *See id.* at § 24-33.5-212(1)(a)(I) (emphasis added); *United States v. Abreu*, 730 F. Supp. 1018 (D. Colo. 1990)

(Colorado State Patrol officers "may inspect, examine, *investigate*, impound, or hold any vehicle for violation of Colorado laws." (emphasis added) (citing Colo. Rev. Stat. § 24-33.5-212(1)(a)(III)). Under Colo. Rev. Stat. § 18-1-901(l)(I), a peace officer, level I includes "a police officer, undersheriff, deputy sheriff, [or] Colorado state patrol officer . . . ." A peace officer "shall have the authority to act in any situation in which a felony or misdemeanor has been or is being committed in such officer's presence, and such authority shall exist regardless of whether such officer is in the jurisdiction of the law enforcement agency that employs such officer or in some other jurisdiction within the state of Colorado or whether such officer was acting within the scope of such officer's duties when he or she observed the commission of the crime, when such officer has been authorized by such agency to so act. . . ." Colo. Rev. Stat. § 16-3-110(2). Possession of a controlled substance is a violation of Colorado criminal law. *See* Colo. Rev. Stat. § 18-18-405.

Here, as discussed in Part IIA, *supra*, Trooper Cox observed a violation of Colorado traffic law when he witnessed Mr. Valenzuela weaving. He properly requested Mr. Valenzuela's voluntary consent to search the automobile. Upon receiving consent to search, *see* Part IIC, *supra*, and conducting the search, Trooper Cox had probable cause to believe that a violation of Colorado criminal laws had occurred. He was thus authorized by statute to arrest Mr. Valenzuela.

Because I conclude that the stop of Mr. Valenzuela, the detention of Mr. Valenzuela, and the search of Mr. Valenzuela's car did not violate the Fourth Amendment and were within the Colorado State Patrol's jurisdiction, I deny the motion to suppress evidence.

III. Motion to Suppress Statements

Mr. Valenzuela moves to suppress any statements he made to officers, arguing that they

were in violation of his Fifth Amendment rights.

A. When a *Miranda* Advisement Must Be Given

The government has the burden of proving that statements made by a defendant during a custodial interrogation were given after an adequate *Miranda* advisement and that the defendant voluntarily, knowingly and intelligently waived his rights. *See Miranda v. Arizona*, 384 U.S. 436, 444-45, 467-76, 479 (1966); *Colorado v. Connelly,* 479 U.S. 157, 169 (1986). Interrogation and custody are two prerequisites that trigger the need for an advisement of constitutional rights. *See Miranda*, 384 U.S. at 444. The parties agree that Mr. Valenzuela was in custody and was interrogated by Agent Torres and Detective Thalhamer. They also agree that he was given two *Miranda* advisements and purported to waive his rights. The issue, therefore, is whether Mr. Valenzuela's waiver was valid.

Once it is determined that a defendant received an adequate *Miranda* advisement, the government may, in its case-in-chief, introduce an admission or incriminating statement made by defendant during a custodial interrogation if the government proves, by a preponderance of the evidence, "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *accord Colorado v. Connelly*, 479 U.S. 157, 168 (1986); *United States v. Hernandez*, 913 F.2d 1506, 1509 (10th Cir. 1990) (quoting *Miranda*, 384 U.S. at 444).

> The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the

> interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)) (citations omitted). In assessing the totality of the circumstances surrounding a waiver, the district court may consider the defendant's age, intelligence, education, language ability, mental condition, experience with the legal system, pressure from law enforcement officers, the explicitness of the waiver, and the length of time between the *Miranda* warning and questioning. *Michael C.*, 442 U.S. at 725; *Nickel v. Hannigan*, 97 F.3d 403, 410 (10th Cir. 1996).

A. "Voluntarily"

Incriminating statements, obtained because of government acts, threats, or promises that overcome the defendant's free will, run afoul of the Fifth Amendment and are inadmissible at trial as evidence of guilt. In determining whether a particular confession is coerced, courts in the Tenth Circuit consider the following five factors: (1) the age, intelligence, and education of the defendant; (2) the length of the detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of his constitutional rights; and (5) whether the defendant was subjected to physical punishment. *See United States v. Glover*, 104 F.3d 1570, 1579 (10th Cir. 1997) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). The determination of voluntariness is based on the "totality of the circumstances" and no single factors listed above is determinative. *Id.*

In addition to the five factors adopted by *Glover*, Congress has codified five non-conclusive factors the district court shall consider when determining the voluntariness of a defendant's confession:

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(b).

B. "Knowingly and Intelligently"

In addition to voluntariness, the government must prove, by a preponderance of the evidence, that defendant "knowingly and intelligently" waived his *Miranda* rights. *Connelly*, 479 U.S. at 168. Waiver is knowing and intelligent if the defendant has "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421. In making this determination, the relevant inquiry focuses on the particular facts and circumstances surrounding the waiver, including the background, experience, and conduct of the accused. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

It is undisputed that an advisement of rights was given to Mr. Valenzuela both at the time of his arrest and then again shortly after arrival at the police station. The advisement he received at the police station is titled, "Colorado State Patrol Advisement of Rights," and follows the requirements of *Miranda v. Arizona*. *See* Government Exhibit 1. The form is fully filled out and

Mr. Valenzuela admits that he initialed each line, signed the form, and dated the form. *See id.*

Agent Torres and Detective Thalhamer both testified that Mr. Valenzuela was read the advisement. Agent Torres testified that he went through the form word-by-word, that Mr. Valenzuela appeared to understand the advisement, and that Mr. Valenzuela initialed the advisement and then waived his rights on the form. Detective Thalhamer testified similarly. Mr. Valenzuela admits that the form was given to him and admits that he understood that he had the right to remain silent. He denied, however, understanding his rights and waiving them voluntarily. His testimony on this point was, again, inconsistent. He admitted receiving a *Miranda* advisement and understanding it, but then said he couldn't be sure if the initials on the advisement form were his, although they probably were. He admits to signing the form, but then stated that the agent filled out the form and his handwriting was not on the form. I find that Mr. Valenzuela is not credible on this point.

As previously mentioned, Mr. Valenzuela is forty years old. Although his education was relatively limited, he appeared intelligent during his testimony. He also has spent significant time in the United States. There is no allegation that his detention was an inordinate length of time. Mr. Valenzuela was transported to the Colorado State Patrol office within thirty minutes of the initial traffic stop. He was re-advised of his *Miranda* rights by officers at the Colorado State Patrol office within an hour of his arrival there, and within ten or fifteen minutes of meeting the officers. The interview itself took approximately one hour. Mr. Valenzuela confessed to his involvement soon after being advised of his rights, knowing that he was facing drug charges. No physical threats or punishment were used to induce his waiver. I therefore conclude that he was properly advised pursuant to *Miranda*, understood those rights, and voluntarily waived those

rights.

Mr. Valenzuela argues, however, that any waiver was not voluntary because it was based on promises and threats from the officers.

Trooper Cox, Agent Torres, and Detective Thalhamer all testified that no threats or promises were made to Mr. Valenzuela, with two exceptions. First, Trooper Cox testified that he told Mr. Valenzuela after reading Mr. Valenzuela his *Miranda* rights that if he cooperated with a controlled delivery, he could receive a lighter sentence. Mr. Valenzuela did not respond. Agent Torres testified that he believed Detective Thalhamer said something similar during the station interview. Second, Agent Torres testified that Mr. Valenzuela was keen to communicate to both them and Trooper Cox that his son was not involved. This communication took place before the *Miranda* advisement at the station. Agent Torres testified that Mr. Valenzuela wanted assurances that his son would not be prosecuted, and he asked to talk to Trooper Cox about his son's involvement. After talking with Trooper Cox he talked with Agent Torres and Detective Thalhamer, and agreed to help with a controlled delivery.

Mr. Valenzuela argues that Trooper Cox told him in the car on the way to the police station that he had to cooperate or else his son would be charged along with him. He further asserts that he only waived his rights and spoke with Officers at the police station because he believed that this was the only way to keep his son from being charged. I again find that Mr. Valenzuela's testimony is not credible. He admits that he was very eager for officers to know that his son was not involved. Further, he did not coherently describe any threats or promises made to him by any officer. His testimony regarding his son's involvement was intertwined with his testimony regarding the officers' statements that if he cooperated in a controlled delivery, things

would be easier for him. Given Mr. Valenzuela's inconsistent testimony throughout the hearing, I find that he is not credible on this point. I therefore find and conclude that Mr. Valenzuela raised the issue of charging his son, and that the Officers involved did not use threats or promises to induce his waiver. Under the totality of the circumstances, Mr. Valenzuela voluntarily, knowingly, and intelligently waived his rights in making the incriminating statements. Thus, I decline to suppress Mr. Valenzuela's statements.

Accordingly, IT IS ORDERED that:

1. Defendant's motion to suppress statements and evidence is DENIED.

Dated: May 31, 2001, in Denver, Colorado.

BY THE COURT:

Lewis T. Babcock, Chief Judge